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No. 86-776

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

U S WEST, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA
and
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF U S WEST, INC. IN SUPPORT OF THE PETITION

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Petitioner U S WEST, Inc. ("U S WEST") hereby addresses certain arguments first raised in the oppositions filed by the Department of Justice ("Department"), the American Telephone and Telegraph Company ("AT&T") and MCI Communications Corporation ("MCI") to U S WEST's Petition for a Writ of Certiorari filed November 13, 1986. U S WEST seeks certiorari on the important question of whether, consistent with traditional notions of due process, a parent company may bind its to-be-divested subsidiaries to competitive restrictions as part of a negotiated settlement of an antitrust suit where (1) the agreed-to restrictions prohibited otherwise lawful business activity after divesti-

ture from the parent; (2) the subsidiaries were non-parties to the lawsuit and were not provided with separate representation allowing address of the restrictions; and (3) the parent could not properly represent the post-divestiture interests of the subsidiaries under well-established concepts of privity because of a fundamental conflict of interest.

The responses of AT&T and the Department raise several new matters which underscore the important jurisdictional and due process issues raised by this case. We briefly address several of these issues.

AT&T contends that a District Court must be empowered to impose prospective restrictions on non-party divested subsidiaries because a Court would otherwise lack jurisdiction to enforce divestiture decrees against the firms created by divestiture.[1] However, a District Court's power to effectuate a divestiture is quite different than whether a decree can be enforced against unrepresented entities. We submit that the scope of the District Court's authority to "enforce" a consent decree against unrepresented parties is obviously a matter of jurisdictional consequence worthy of review.

Furthermore, AT&T's contention that the District Court needs the authority to bind non-party subsidiaries to post-divestiture business restrictions in order to effectuate divestiture decrees is not borne out by a review of the case law. *No* published case could be found where a District Court approved a parent company's agreement to post-divestiture business restrictions on behalf of the

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[1] AT&T Opposition at 9. It should be noted that MCI appears to disagree with AT&T's assertion about the expanse of the District Court's powers in stating that "the district court had only limited authority to reject or modify the terms of the proposed decree (*United States v. AT&T*, 552 F. Supp. at 151). . . ." MCI Opposition at 11 n.9.

to-be-divested subsidiaries—far less one where the restrictions inured to the direct competitive benefit of the antitrust defendant. In fact, the only "continuing restriction" divestiture cases found involved agreement by parents to certain injunctive restrictions on their *own* activities.[2]

Obviously, a parent company, as a named party and full participant in a law suit, can agree to restrictions on itself as part of a settlement. Important jurisdictional issues are implicated, however, where the parent attempts to bind the business operations of its to-be-divested subsidiaries in a manner which precludes them from competing with their former parent. It is for this reason that a unity of interest sufficient to establish legal privity for the purpose of binding the subsidiaries to post-divestiture business restrictions was not present.

Lastly, the Department recognizes that AT&T owed a fiduciary duty to the future shareholders of the to-be-divested companies.[3] While U S West has framed this duty in terms of the corporate entity itself, the fact that the interests of the pre- and post-divestiture shareholders would necessarily diverge places the Department's position very close to the position taken by Petitioner. Recognition of a duty flowing to the shareholders of the to-be-divested companies raises serious questions about whether AT&T, as a fiduciary, could agree to the "continuing restrictions" given traditional privity analysis which requires an alignment of interests.[4] Put another way, the issue of whether the parent company could properly represent the post-divestiture interests of its former subsidiaries regarding matters in which there

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[2] *See, e.g., Ford Motor Co. v. United States*, 405 U.S. 562 (1972); *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981).

[3] Department Opposition at 9; 10 n.10.

[4] *See* U S WEST Petition at 22.

was an inherent conflict raises serious due process concerns.[5]

For the foregoing reasons, as well as those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] MCI also contends that because U S WEST has accepted the benefits of divestiture, it is estopped from challenging the decree. MCI Opposition at 8. As explained in our petition, however, having been denied independent representation and/or party status, the operating companies were at the mercy of AT&T. In fact, the decree negotiated by AT&T and the Department expressly precluded any independent action by the operating companies until divestiture had been effectuated. *See* U S WEST Petition at 11. Subsequent to divestiture, U S WEST has tried a variety of means to raise the issues addressed here. *Id.* at 11-12.